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No. 06-989

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

HALL STREET ASSOCIATES, L.L.C.,
Petitioner,

v.

MATTEL, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the Ninth Circuit Court of Appeals err when it held, in conflict with several other federal Courts of Appeal, that the Federal Arbitration Act ("FAA") precludes a federal court from enforcing the parties' clearly expressed agreement providing for more expansive judicial review of an arbitration award than the narrow standard of review otherwise provided for in the FAA?

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REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioner Hall Street Associates, L.L.C ("Hall Street") submits this Reply Brief to address new points raised in the Opposition to Petition for Writ of Certiorari ("Opp. Br.") filed by Respondent Mattel, Inc. ("Mattel"). *See* Sup. Ct. R. 15.6 (authorizing reply brief for that purpose).

In its opposition brief, Mattel does not contest that the standards set forth in Supreme Court Rule 10 for the grant of a petition for a writ of certiorari have been met. In fact, the opposition brief is more notable for the arguments that it does not contain than for the arguments that it does contain. Significantly, Mattel does not contest that: (1) there is a wide, irreconcilable and deepening split between the United States

Courts of Appeals over whether the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, allows parties to agree to non-statutory grounds for vacating an arbitration award; (2) this is an important federal issue in an area of law where there is a particular need for national uniformity; (3) the Ninth Circuit's decision in this case directly conflicts with the decisions of the First, Third, Fourth, Fifth, and Sixth Circuits; and (4) the Ninth Circuit's decision is fundamentally at odds with this Court's cases interpreting the FAA, cases which emphasize freedom of contract and enforcement of arbitration agreements as written.

Ignoring the fundamental factors supporting a decision to grant certiorari, Mattel instead proffers three arguments that border on the frivolous and are utterly unrelated to the merits of Hall Street's certiorari petition. First, Mattel suggests that Hall Street did not preserve error below. Second, notwithstanding the rulings of the district court in Hall Street's favor, Mattel contends that Hall Street would lose on the underlying merits even if this Court concludes that the FAA permits parties to agree to expanded judicial review of arbitration awards. Lastly, Mattel contends that Hall Street somehow has "unclean hands," which makes a grant of certiorari inappropriate. Mattel's arguments are without merit.

REASONS FOR GRANTING THE WRIT

I. Hall Street's Claim of Error Has Been Preserved.

Mattel erroneously states without elaboration that Hall Street did not preserve its arguments. (Opp. Br., p. 10.) Mattel does not identify the arguments that it claims were not raised. However, Mattel does not contest the fact that Hall Street sought expanded judicial review of the arbitrator's decision in the district court pursuant to the parties' arbitration agreement and later urged the Ninth Circuit to uphold the application of that standard of review in connection with the

first appeal filed by Mattel.[1] In fact, Mattel concedes in its opposition brief that "there has been exhaustive review of Hall Street's claims" at all stages of the litigation and, most importantly, that "the points appearing" in Hall Street's petition were, in fact, raised by Hall Street in connection with the first appeal to the Ninth Circuit. (*Id.*)

Hall Street clearly contended throughout the first appeal that the expanded judicial review provision was enforceable under the FAA. Hall Street stated in its initial brief to the Ninth Circuit that it did not concede the correctness of the en banc decision in *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987 (9th Cir. 2003), *cert dismissed* 540 U.S. 1098 (2004). Hall Street's Combined Opening Brief and Answering Brief, Case Nos. 03-35525 and 03-35526, p. 31 & n.5. In addition, Hall Street argued vigorously in this brief and during oral argument against application of *Kyocera* and in support of the parties' expanded judicial review agreement. *Id.* at pp. 27-33. The first appeal was the appropriate time to raise the propriety of expanded judicial review and Hall Street clearly raised the issue at that time, as Mattel concedes.

To the extent that Mattel implies that Hall Street was required to raise the same issue in the second Ninth Circuit appeal, Mattel is incorrect. The second appeal was concerned with the issue of whether the district court had correctly applied the FAA's limited standard of review. (App., 132a-133a.) The parties' agreement for expanded judicial review was not an issue because the Ninth Circuit already had ruled that the FAA prohibited enforcement of that agreement. That ruling became "law of the case" for the district court on remand and in the second appeal. Hall Street was therefore

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[1] When the case was first litigated in the district court, the Ninth Circuit permitted parties to agree to expanded judicial review of arbitration awards. *LaPine Tech. Corp v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997). Therefore, no party contested the enforceability of the expanded judicial review provision in that forum. (App., 46a).

not required to challenge the Ninth Circuit's initial ruling on expanded judicial review on remand before the district court or on the second appeal. *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916) (while the Court of Appeals decision in the first case may be "law of the case" for the district court and the Court of Appeals in the second case, the Supreme Court has the authority "to rectify any error that may have occurred in the interlocutory proceedings"). *See also Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001); *Mercer v. Theriot*, 377 U.S. 152, 153 (1964).

Mattel has conceded that Hall Street raised the points appearing in the current petition during the first appeal to the Ninth Circuit. (Opp. Br., p. 10.) Hall Street has continuously argued throughout these proceedings that the expanded judicial review provision was enforceable and against the application of *Kyocera*. Mattel's half-hearted preservation defense is without merit.

II. The Expanded Judicial Review Issue Is Squarely Presented In This Case

Much of Mattel's opposition brief is devoted to arguments on the underlying merits of this case and, particularly, its contention that the arbitrator's decision would be upheld even if subjected to *de novo* review for errors of law. (Opp. Brief, pp. 10-14.) However, Mattel does not argue that anything prevents this Court from reaching the issue presented by Hall Street in its petition.

Mattel's arguments are an attempt to put the proverbial cart before the horse. The threshold issue in this case, and the only issue raised by Hall Street's petition, is the legal standard that the district court must apply in its review of the arbitrator's award. All other issues on the merits of the arbitration decision are secondary to the resolution of this fundamental legal issue, which is squarely before this Court.

None of the issues presented by Mattel regarding the underlying merits of the case need be decided by this Court, which should properly confine itself solely to the standard of review question. Mattel appears to accept this proposition since it does not argue that the issues that it raises on the merits will prevent this Court from deciding the proper standard of review.

Mattel suggests, however, that the Court should not grant the writ because, according to Mattel, it will ultimately prevail on the merits. (Opp. Br., p. 10.) Mattel's confidence in this regard is misplaced because the only court to address its current arguments plainly rejected those arguments. (*See, e.g.*, App., 47A-56A, 105A-110A.)[2] In addition, when the Ninth Circuit reversed the district court's decision setting aside the arbitrator's award under the narrow FAA standard, dissenting Judge Susan Graber stated that the arbitrator's opinion was "completely irrational," while Judge Stephen Reinhardt, writing for the majority, acknowledged that the arbitrator's decision contained possible errors of law. (App. 132A-133A.)

The record establishes that Hall Street is currently saddled with a legally erroneous arbitration decision which is immunized from attack merely because the Ninth Circuit refuses to enforce the mutual and central agreement of the parties to allow *de novo* review of legal issues by the district court. When one considers that the district court approved the

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[2] For instance, the district court already rejected Mattel's contentions stated in its opposition brief that Hall Street did not suffer damages; that the arbitrator made findings of fact regarding intent that are somehow binding on the district court with regards to Hall Street's claim of legal error; that the arbitrator's decision was consistent with other terms and conditions in the lease; and that Hall Street did not timely seek review of the arbitrator's decision. (App. 47a-56a, 105a-110a.) The Ninth Circuit did not review the district court's decisions rejecting these arguments because it disposed of the case solely on the standard of review issue. (App., 115a-116a.)

parties' expanded judicial review agreement in reliance on Ninth Circuit caselaw permitting such agreements, the injustice of the Ninth Circuit's decision is readily apparent. (App., 46a.)

While it is tempting to address and refute Mattel's arguments on the merits in this reply brief, Hall Street will resist the temptation. It suffices to say simply that these issues do not prevent this Court from resolving the split in the circuits on the enforceability of expanded judicial review provisions. Any remaining issues which Mattel presents in its opposition brief do not need to be reached by this Court. These issues were fully briefed by the parties in the Ninth Circuit, were not reached by the Ninth Circuit because it disposed of the appeal solely on the basis of the expanded judicial review issue, and can be determined by the Ninth Circuit on remand if necessary.

III. Mattel's Unclean Hands Defense Is Baseless.

In an exercise of obfuscation to distract attention from the fact that the important issue of federal law presented in Hall Street's petition is undeniably ripe for decision, Mattel casts numerous baseless aspersions against Hall Street which are unsupported by the record. For example, although Mattel alleges that Hall Street has "not complied with" or has disobeyed "the orders and judgments of the lower courts," Mattel fails to identify any order or judgment that Hall Street has disobeyed or not complied with. (Opp. Brief, pp. i, 10.) Mattel cannot identify any such orders because Hall Street has obeyed and complied with all judgments and orders of the lower courts.[3]

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[3] To the extent that Mattel refers to the February 26, 2007 judgment for fees and costs entered in its favor after this petition was filed, Hall Street has filed a precautionary appeal of that judgment with the Ninth Circuit in the event that this Court grants the writ and the judgment is ultimately overturned. *Hall Street Associates, L.L.C. v. Mattel, Inc.*, Ninth Circuit

Mattel's accusations are an attempt to distract this Court from the central legal issue posed by this case: whether the parties are entitled to contract for expanded judicial review of arbitration awards. A review of the facts makes clear that Mattel's accusations are baseless and are without support in the record.

After environmental contamination was discovered on the property, Mattel terminated its lease with Hall Street, leaving Hall Street with vacant industrial property that had been occupied by Mattel and its predecessors for many years. (App., 40a-44a.) Hall Street sold the property in September 2004 when Hall Street had a judgment against Mattel for $810,107.49 and before the Ninth Circuit reversed the district court's original judgment in favor of Hall Street and remanded for further proceedings. (App., 112a-116a.) The remand resulted in an even greater money judgment entered in favor of Hall Street in June of 2005 when the district court again vacated the arbitrator's decision, this time under the FAA standard. (App., 129a-130a.)

There has never been any court order or any other prohibition against Hall Street's sale of its contaminated property. No court has ever questioned the propriety of Hall Street's actions in any way with regard to the sale of the property or the funds resulting from that sale. Nor has Hall Street been reprimanded or sanctioned in any way due to its decision to sell the vacant property which Mattel abandoned or for any other reason.[4]

No. 07-35257. The fact that Hall Street has not paid a disputed money judgment pending this Court's consideration of its petition is not improper and does not constitute a failure to comply with the order or judgments of any court.

[4] While Mattel states, without citation to the record, that Hall Street was "challenged" to explain the sale of the property and account for the proceeds in the district court and the Ninth Circuit, to the extent any such challenge was made, it was made by Mattel, not the courts. (Opp. Br., pp.

Mattel's accusations are unsupported by the record and are beneath the dignity of this Court. Mattel has not established that Hall Street has acted improperly in any way. In addition, Hall Street has not cited any authority to this Court which would indicate that a petition for a writ of certiorari should be denied under the circumstances of this case.[5] Mattel's unclean hands defense has nothing to do with the issue of expanded judicial review of arbitration awards under the FAA and should be disregarded.

IV. Conclusion

Hall Street has established, and Mattel does not contest, that there is a clear and irreconcilable split in the circuits regarding the enforceability of expanded judicial review provisions in agreements to arbitrate. Five circuits enforce these agreements; two others, including the Ninth Circuit, do not. (Hall Street's Petition for a Writ of Certiorari, pp. 11-20.) The legal issue presented by Hall Street's petition is an important issue of federal law in an area where there is a need for national uniformity, a point which Mattel again does not contest. The issue is directly presented by this case and its

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8, 19.) The courts in this proceeding have never questioned Hall Street's integrity in the least, nor have they directed Hall Street to account for the proceeds of the sale. In addition, the implication that the Ninth Circuit imposed a bond requirement upon Hall Street as a condition for a stay of the Ninth Circuit's mandate pending disposition of this petition due to alleged improper behavior is wholly inaccurate. (*Id.*) The Ninth Circuit's order conditioning a stay upon the posting of a bond does not contain any language supporting Mattel's self-serving interpretation.

[5] The sole case cited by Mattel in its opposition on this issue, *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806 (1945), did not apply the unclean hands doctrine to the decision whether to grant a petition for a writ of certiorari. Rather the case is a garden variety application of the unclean hands doctrine in a case where a party guilty of serious misconduct sought equitable relief from the Court. The case has no application here.

ultimate resolution against Hall Street has dictated the case's outcome. Mattel has failed to demonstrate any impediment to this Court's resolution of this legal issue. For these reasons and for the reasons set forth in Hall Street's petition on file with this Court, a writ of certiorari should be granted in this case.

Respectfully submitted,

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